No. 12712

United States Court of Appeals

FOR THE NINTH CIRCUIT

L. I. MACKLIN, et al,
Appellants,

v.

KAISER COMPANY, INC.,
Appellee.

Appeal from the United States District Court for the District of Oregon

APPELLANTS' REPLY BRIEF

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THE POSITION OF APPELLEE ON APPEAL

In the trial court appellee considered it a matter of self interest to stipulate and jointly request entry of judgment against it for $17,387.83 (R. 24) and to offer evidence admitting that this sum was "agreed to be owing" (R. 98-99). Even when the trial court expressed doubts as to the propriety of such a judgment defendant submitted a brief in support of its validity (R. 180 and Appendix A hereof) and as late as July 3, 1950, long after Judge Fee had originally refused to enter judgment, appellee stated that it still had "no objection to the entry of judgment in accordance with the stipulation" (R. 171).

This appeal asks no more than that the same judgment now be entered as both parties previously stipulated upon and jointly requested. One would thus expect that the same joint request for entry of judgment would be made in this court and, at least, that neither party would seek to interpose objections to the entry of such a judgment. Indeed there are established rules of law that on appeal both parties are bound by the same position and theories as taken before the trial court; that a fact or conclusion admitted in the lower court is binding upon a party on appeal; that a party will not be permitted to assume a position on appeal inconsistent with that taken by him in the trial court and that a judgment will not ordinarily be either affirmed or reversed on appeal upon grounds of defense not asserted in the trial court. 3 *Am. Jur., Appeal and Error,* pp. 35-7, 61, 417-424.

Now, however, while appellee concedes in its brief (p. 2) its duty in the *trial* court to abide by his stipulation for the entry of judgment, appellee now takes the position that it has no such duty whatever *on appeal.* In order to justify this result it is contended (p. 3) that the stipulation was conditioned upon rendition of a judgment. But even if this is true, there is nothing in the stipulation which prevented either party from seeking redress by appeal to require the trial court to enter a judgment in accordance with the stipulation or which prevented application to an appellate court for entry of such a judgment. Moreover, appellee admitted that the amount of the requested judgment was "agreed to be owing to plaintiffs" (R. 98-99).

Appellee next contends (p. 3) that this case does not involve any issue whether it "has failed to keep its bargain." But stripped of all fine distinctions of legal sophistry the fact remains that appellee has failed to make payments "agreed to be owing" and has now for the first time interposed objections to the entry of judgment which it agreed to by stipulation. This would enable appellee to completely escape all liability for such an admitted debt.

By the foregoing tortuous process appellee finally (p. 3) cast aside its obligations under the stipulation for entry of judgment (never mentioning that it once admitted that the amount of the judgment was "agreed to be owing") and concludes that it is under a duty to justify the trial court in refusing to enter judgment as previously stipulated and requested by both parties.

ARGUMENT

I. REPLY TO ARGUMENT THAT DISTRICT COURT DID NOT ERR IN REFUSING TO ENTER JUDGMENT BASED ON STIPULATION.

A. Reply to Argument that Courts Will not Abdicate Judicial Functions at Instance of the Parties.

1. *The Issue.*

Apparently the parties are not in agreement as to

the issue in this case. Appellee would state (p. 3) the principal issue in this case as follows:

> "The question is whether the trial court was stripped of its *power* to act as a judicial officer and its *right* to exercise sound judicial discretion merely because of the stipulation for judgment."

While it is true that appellants take the position (1) that the courts have a *duty* to enter judgments based upon stipulations of the parties, it is also appellants' position (2) that this does not strip courts of their rights and powers as judicial officers, for reasons stated below; (3) that, at the least, courts have the *power* to enter judgments based on stipulations; (4) that in this case such power should have been exercised by entry of judgment and (5) that where, as here, the court refused to enter such a judgment and did so upon the ground that it had no power to do so it committed error.

2. *Courts under Duty to Enter Judgments on Stipulation and Not Thereby Stripped of Judicial Power.*

Appellee agrees (p. 9) with the policy of the law to encourage settlements, with the rule that settlements will be upheld even though a different result might follow a trial on the merits and that stipulations of fact are normally binding on the courts. Appellee takes issue, however, (at p. 9) with appellants' contention that the parties may stipulate to the entry of judgment and that it is then the *duty* of the court to enter judgment accordingly. No attempt is made to attack the

validity of the many authorities cited in appellants' brief (pp. 20-24) in support of this rule or even to distinguish them in any way. Indeed appellee ignores them completely and apparently calls upon this court to do likewise, including *Pacific Ry. Co. v. Ketchum,* 101 U. S. 289, 297; *Horniska v. Dolph* (C.A. 9), 133 Fed. 158; and Rule 68 of the Federal Rules of Civil Procedure.

Appellee next makes the point (pp. 9-10) that the entry of a consent judgment is a judicial function. This may be true, but still does not relieve the court from the duty to enter such judgments. Indeed freedom of action by the courts is circumscribed by innumerable statutes and rules of law imposing duties to act in specified ways under specified circumstances. Such is the entire basis of our system of jurisprudence and no one has ever suggested that because the courts do not have unlimited freedom of action in all cases they cease to function judicially and become mere "rubber stamps" —bound to act as commanded by statute or in accordance with long-established precedents. Thus the fact that a rule of law has been established to the effect that where the parties stipulate for the entry of judgment the courts have the duty to enter judgment accordingly cannot validly be urged as stripping courts of judicial power, but only as directing the courts to exercise such power in accordance with this rule of law.

3. *Cases Cited by Appellee do not Establish Contrary Rule.*

Appellee next (p. 10) cites nine cases as opposed to

the foregoing rule and as in support of the contrary contention that a court need not and will not "abdicate its functions as a court" merely because the parties have stipulated for the entry of judgment. These cases, mostly from district or state courts, are analyzed in Appendix B of this brief. As noted therein all of those cases are clearly distinguishable and fall far short of establishing the foregoing proposition. Thus they should require no further mention except to point out that the case of *Automobile Ins. Co. v. United States* (D. Or.) 10 F.R.D. 489 (J. Fee) serves well to illustrate the extreme lengths required by the same reasoning of Judge Fee as applied in this case, for if the parties to a settlement are to be required to go to the time and expense of a "full dress" pre-trial and trial, and if judgment is then to be entered only if the court approves the settlement in all particulars, including the exact amount to be paid, then the most important incentives for voluntary settlements are completely destroyed. Thus this entire course of action embarked upon by Judge Fee is completely contrary to the established policy of the law to encourage voluntary settlements (see Apts' Br. 14-23) and while in that case some scrutiny of the merits of settlements under the Tort Claims Act may be required by its express terms, the extension of such requirements to cases such as this is wholly indefensible.

But even if the cases cited by appellee be considered as in point and without distinction, it is nevertheless submitted that they wholly fail to overcome the numerous authorities cited in appellants' brief (pp. 20-24) to the effect that when the parties stipulate for entry of

judgment the court has the *duty* to enter judgment accordingly and must therefore be taken as representing a minority view upon this question.

4. *Even if court must first consider jurisdiction, execution of stipulation and fraud it THEN has duty to enter judgment as stipulated and acts judicially in doing so. These requirements are satisfied in this case.*

The most that can be said for the nine cases cited by appellee is that they tend in some measure to support the proposition next set forth in appellee's brief (pp. 11-12) to the effect that before entering judgment on stipulation a court will consider (1) Whether it has jurisdiction; (2) The existence and validity of the agreement and the power of the parties to execute it; (3) In some cases, whether the agreement is fair and equitable, and (4) Whether the agreement is free from fraud. It is then urged (p. 12) that in view of these "requirements" the trial court in considering a stipulation for judgment must do more than act as a "rubber stamp," but remains a judicial officer with the duty to exercise judicial discretion.

It must be conceded that there is some authority in support of the proposition that before entering judgment on stipulation the Court should be satisfied (1) that it has jurisdiction over the subject matter, (2) that the stipulation was duly executed by persons with proper authority, and (3) that there was no fraud. It follows, under this view, that in making such determina-

tions the court acts judicially and not as a "rubber stamp". It also follows under this same view, however, that once the court is judicially satisfied on these three points it then has the affirmative *duty* to enter judgment in accordance with the stipulation.

In this case, as demonstrated below (p. 11, 23), the court clearly had jurisdiction over the subject matter. No question has ever been raised as to the execution of the stipulation or the authority therefor. Nor has there ever been any suggestion of fraud. It therefore follows that even under the foregoing view Judge Fee had the duty to enter judgment as stipulated.

The further requirement suggested by appellee, namely, that in suits in equity and when the public interest is involved the court will inquire whether the agreement is fair and equitable, is wholly inconsistent with the concession by appellee (at p. 9) of the rule that generally a settlement will be upheld even though the court believes that a different result would have been attained by a trial on the merits. Likewise, the views of Judge Fee, who would require a trial on the merits, (see *Auto Ins. Co. v. United States,* supra) is wholly inconsistent with this established rule. The application of such a proposed requirement in cases under the Fair Labor Standards Act is discussed further below. But even conceding for purposes of argument alone that such a requirement is applicable in this case, which appellants strongly deny, the short and conclusive answer is that Judge Fee specifically found in this case on May 13, 1946, that *"the transaction was fair and regular and*

an appropriate settlement was arrived at.'' (R. 103 at 105). Therefore this last of appellee's purported requirements was also clearly satisfied and again it follows under appellee's own theory that Judge Fee at least *then* had the duty to enter judgment as stipulated by the parties and as jointly requested by appellee at that time.

5. *The courts have not only the DUTY but the POWER to enter judgments based on stipulations and a court commits error in refusing to enter such a judgment upon alleged lack of power when ample power existed.*

The principal objections raised by Judge Fee concerned not his *duty,* but his *power* to enter judgment as stipulated by the parties. Thus he held that ''. . . it was beyond the *power* of the court to enter any judgment'' (R. 169). But, as demonstrated in appellants' opening brief (pp. 24-47) and as further demonstrated below, all of his doubts as to power were wholly groundless.

Thus position of appellants on this issue is two-fold:

(1) The trial court in this case had the affirmative *duty* to enter judgment as jointly requested by both parties, both (a) initially upon the basis of the stipulation of the parties and their joint request for entry of judgment and, at least, (b) upon the later completion of the hearing at which it clearly appeared that the court had jurisdiction over the subject matter, that the stipulation was properly authorized and executed, that the settlement was fair and regular and that there was no fraud.

(2) The trial court at least had the *power* to enter judgment as stipulated and jointly requested by the parties, upon either the basis of (a) or (b) above, and in failing and refusing to exercise such power on the ground that none existed the trial court proceeded to abuse its power and to decide this case on wholly untenable grounds, for which it is subject to reversal. *United States v. Fischer* (2nd Cir.) 93 F (2d) 488, 489.

It is thus clear that this case does not involve the question of stripping the courts of their judicial functions or of converting them into "rubber stamps." Appellants insist only that the courts recognize the duties imposed upon them by rules of law established, for the most part, by judicial decision and precedent and that the courts recognize and exercise the powers similarly established by long-standing precedent; that in so doing the courts act judicially and in complete accord with our system of jurisprudence, but that where a court both denies the existence of such duties and refuses to recognize and exercise such powers it ceases to act judicially and acts in an arbitrary manner and by so proceeding is subject to reversal.

B. Reply to Argument that Courts Could, Prior to Portal-to-Portal Act, Refuse to Enter Judgments on Stipulation in Cases Under Fair Labor Standards Act.

1. *Once Jurisdiction of Court is Properly Invoked, it has Duty to Hear and Determine Case and such Jurisdiction is Not Dependent upon its Ultimate Decision.*

It is contended by appellee (at p. 14) that District Courts have limited jurisdiction, placing the burden on plaintiff "to have the record affirmatively show the existence of jurisdiction"; that consent of the parties cannot create such jurisdiction and that lacking jurisdiction over the subject matter the court lacks power to enter a consent judgment. Conversely, of course, appellee must concede that if a court has jurisdiction over the subject matter it would then at least have power to enter a consent judgment.

It is also equally important to bear in mind in this case that jurisdiction over cases arising under the Fair Labor Standards Act is based upon the fact that "the district courts shall have original jurisdiction of any action or proceeding under any Act of Congress regulating commerce or protecting trade and commerce" (28 U.S.C.A. Sec. 1337); that the Fair Labor Standards Act is such an act, *Robertson v. Argus Hosiery Mills,* 121 F (2d) 285, cert. den. 314 U.S. 681, and also specifically provides that actions to recover back wages "may be maintained in any court of competent jurisdiction," 29 U.S.C.A. sec. 216 (b); that jurisdiction of the District Courts is usually dependent upon the allegations of the complaint, whether well founded or not, *Utah Fuel Co. v. Nt. Bit. Coal Comm.,* 306 U.S. 56 at 60; that such jurisdiction of the District Courts is dependent upon the initial involvement of a federal question, not upon the tenability of plaintiffs' view at the ultimate decision; 1 *Barron and Holtzoff, Federal Practice and Procedure,* sec. 25, p. 51; that for jurisdiction to attach in such a case it is necessary only that it appear

that the action concerns an Act of Congress regulating commerce and such jurisdiction will not be defeated by the final interpretation given such Act. *Young & Jones v. Hiawatha Gin & Mfg. Co.,* 17 F. (2d) 193. See also *Toledo P. & W.R.R. v. Bro. of R. R. Trainmen,* 132 F (2d) 265, 268; that once a District Court acquires jurisdiction it retains power to decide the merits of a case even though it is ultimately found that no interstate commerce was involved, *Southern Pac. Co. v. Van Hoosear,* (9 Cir.) 72 F (2d) 903, at 911; *Oregon R. & N. Co. v. Campbell* (D. Ore.) 173 Fed. 957, at 966, aff'd. 230 U.S. 525. cf. *Jefferson v. Gypsy Oil Co.,* 27 F (2d) 304, at 306 and *Fielding v. Allen,* 181 F (2d) 163 at 166; and that once jurisdiction of the federal courts is properly invoked it becomes their duty to hear and determine a controversy, even though doubtful in nature, *Rogers v. Paving Dist.* 1, 84 F (2d) 555 at 557. See also *Los Angeles Ry. Corp. vs. Ry. Comm.* 29 F (2d) 140 at 143, aff. 74 L. Ed. 234 and *Doyle v. Northern Pac. Ry.,* 55 F (2d) 708 at 710.

The foregoing considerations also further support the view that the District Courts have ample power, as well as the duty, to enter judgments on stipulation in cases arising under the Fair Labor Standards Act. See also *Fleming v. Warshawsky & Co.,* 123 F (2d) 622 at 625; *Fleming v. Alderman,* 51 F. Supp. 800 at 801. cf. *Ulle v. Diamond Alkali Co.,* 67 F. Supp. 249. Nor is such jurisdiction destroyed by stipulation for judgment. *Swift & Co. v. United States,* 276 U. S. 311, at 325-7.

2. *Approval of Stipulations for Judgment in Actions for Back Wages under Fair Labor Standards Act Prior to Portal Act did not Involve Consideration of Whether "Fair and Equitable", but only Whether Coverage or other Legal Questions under Act had been Compromised.*

Appellee next contends (p. 14) that rights under the Fair Labor Standards Act are "colored with public interest." But it does not necessarily follow from this, as next contended (p. 15) that a court has power to refuse approval of such settlements merely because not in accordance with his personal views as to what is "fair and equitable." *Muschaney v. United States,* 324 U. S. 49 at 66. Nor do the cases cited by appellee (p. 15) support this conclusion.

Rogan v. Essex County News, 65 F. Sup. 82, held only that there should be a showing that "statutory requirements" had been met and cited cases holding that rights under the Act could not be waived. *Jarrard v. Southeastern Shipbuilding Corp.,* 163 F (2d) 960, held only that full faith and credit *required* it to give effect to a consent decree by a state court which had found that a settlement under the act was fair and equitable and neither held or implied that the state court could have otherwise refused to approve the settlement. Nor does the analogy of the exercise of such powers in suits in equity (p. 12) hold true, since actions by employees to collect back wages under Section 16 (b) are not suits in equity.

It has been held that on *appeal* from a consent judgment under the Act, the only questions to be considered were (1) lack of federal jurisdiction, (2) lack of actual consent to the decree, and (3) fraud in its procurement. *Walling v. Miller,* 138 F (2d) 629, 631, citing *Swift v. United States,* supra. Thus it would also appear that, at the most, these same three factors are the only ones which can properly be considered by a court in passing upon a motion for entry of judgment based on stipulation in such a case, since if other factors could be considered by the trial court, the correctness of their consideration could also be raised on appeal.

The only other possible fourth factor for consideration by the trial courts, prior to the Portal to Portal Act in 1947, would be to see that, in view of *D. A. Shulte, Inc. v. Gangi,* 328 U.S. 108, there had been no compromise on any question of law, such as the question of coverage under the Act, and that the only compromise involved in the settlement was of questions of fact, such as the number of hours worked. Indeed this was the only initial question raised by Judge Fee on May 13, 1946, (R. 103 at 105) and, as later demonstrated, appellee was in complete agreement with appellants at that time that the requirements of the *Schulte* case were fully satisfied and that the Court both had jurisdiction to and should enter judgment as stipulated by the parties (See Appendix A).

It is thus submitted that even in employee actions for back wages under this Act the above four factors are the most that can properly be considered by the trial

court and that upon their being satisfied the court has both the power and duty to enter judgment as stipulated by the parties and would commit error in refusing to do so merely because of his personal views as to what is "fair and equitable." But even if this further factor could properly be considered in such cases, it was amply satisfied in this case by the finding of Judge Fee that this transaction was "fair and regular," which thus removed the last possible barrier to the entry of judgment as stipulated by the parties, with the result that he then had both the power and the duty to enter such judgment.

3. *Prior to the Portal-to-Portal Act Settlements of Claims under the Fair Labor Standards Act were Valid and Binding if they Involved no Compromise of Legal Questions but only Involved Questions of Fact.*

Appellee next contends (p. 15-17) that prior to enactment of the Portal-to-Portal Act the validity of *any* compromise of a claim arising under the Fair Labor Standards Act was generally in doubt, including not only compromises of disputes over coverage, but all other compromises, even though limited solely to a dispute over the number of hours worked.

The most conclusive answer to this contention is to refer to the specific language of the contentions made by appellee in the lower court on this same question, as set forth by the brief of appellee filed below and included in this record, but not printed, by stipulation (R. 146-9, 189, 204). That brief is included herein as Ap-

pendix A. It will thus be noted that before the trial court appellee contended that the *Schulte* decision is limited to compromises of "disputes over coverage" (Ap. 54); that it has "no application to the present case" (Ap. 56); that the court "should not extend" this doctrine (Ap. 59); that "the real issue here is a dispute over the number of hours worked" (Ap. 56); that neither the *O'Neil* or *Schulte* cases indicate that the parties cannot compromise such a dispute (Ap. 56); and "meant to preserve to the parties the right to enter into compromises" of such disputes (Ap. 57); that this is particularly true where, as here, the case involves "actual litigation in which the issues have been pleaded and a stipulation for entry of judgment has been submitted to the Court for its consideration and approval after both parties presented evidence with respect to the merits of the settlement" (Ap. 60); that no "issue with respect to coverage" is presented in this case (Ap. 61); that the only real issue related to the amount of time worked by plaintiffs (Ap. 62); that the proposed settlement "is one which the Court has characterized as 'fair and regular' " (Ap. 63) and that for these reasons the trial court both had jurisdiction and "power to enter judgment pursuant to the stipulation of the parties" (Ap. 64). See also *Urbino v. Puerto Rico Ry. Light & Power Co.*, 164 F (2d) 12 at 14.

It is submitted that the above arguments by appellee in its brief below not only completely disprove the present contentions of appellee, but that having taken such a position in the lower court appellee is bound by that position and is thereby estopped and should not

now be heard to urge the contrary (see supra p. 2, including 3 *Am. Jur.*, pp. 35-7, 61, 417-424).

4. *"JUDICIAL SCRUTINY"* of Consent *Judgments under Fair Labor Standards Act at Most Extends to Factors of (a) Jurisdiction, (b) Reality of Consent, (c) Fraud and, perhaps, (d) Whether Legal Questions have been Compromised.*

Appellee next contends (pp. 17-20) that proposed consent judgments under the Fair Labor Standards Act are subject to *"judicial scrutiny,"* to what extent and purpose is not made clear, but the inference is left that the court has complete discretion whether or not to enter such a judgment; that according to the *Rogan* case, supra, there must at least be "either proof or stipulation of facts" showing "that the statutory requirements have been met," and that otherwise the employer would not be protected by such a judgment.

Again, the best answer to these contentions is to be found in the position of appellee before the lower court, where it joined in asking that the stipulation for judgment be approved and judgment entered based thereon and in that connection submitted a brief contending that there had been ample proof submitted to support such a judgment in that "the testimony given at the hearing was typical of that which is to be expected in any litigation" (Ap. 50); that in view of the conflict of testimony the parties had acted reasonably in stipulating that "the plaintiff shall be paid for fifteen minutes each day and

shall receive overtime and liquidated damages based upon such time allowance." (Ap. 57); that there was no issue as to coverage in view of the fact that "it was conceded that the company itself was engaged in commerce or the production of goods for commerce" and the fact that investigations had disclosed that there were no facts to deny plaintiffs' allegations that each had engaged in work covered by the Act during each work week (Ap. 61-2); that the only fact in dispute related to the amount of time worked by plaintiffs, which was "a factual question on which the parties have agreed by stipulation" (Ap 63); and that the Court had "full power to enter judgment pursuant to the stipulation of the parties." (Ap. 64).

It is therefore submitted that the proceedings in this case fully satisfy the purported requirement of "either proof or a stipulation of facts" showing that the statutory requirements of the Act had been met, as claimed by appellee to be necessary for judicial approval and for the judgment to bar subsequent action, even assuming the correctness of the holding in the *Rogan* and other cases cited by appellee (p. 18-19) and the present contention of appellee as set forth above, and that appellee is barred by the position taken by it in the lower court from making any such contention at this time.

Needless to say, however, appellants do not agree with the holding in the *Rogan* case, for reasons set forth above (p. 13-5). Nor do appellants agree with the contention (p. 19) that consent judgments do not bar subsequent actions unless based upon stipulation or trial (see

Annotation 2 A.L.R. (2d) 514, at 526, citing *O'Cedar Corp. v. Woolworth Co.,* 66 F (2d) 363, cert. den. 291 U.S. 666) but contend the only questions as to the binding effect of consent judgments under the Fair Labor Standards Act (prior to the Portal Act) arose where it appeared that there was no bona fide dispute (*Brooklyn Savings Bank v. O'Neill,* 324 U.S. 697) or that there had been a compromise of some question of law, such as of coverage under the Act (*D. A. Schulte, Inc. v. Gangi,* supra). See also Apts. Op. Br. pp. 42-44 and *Urbino v. Puerto Rico Ry. Light & Power Co.,* supra, at 14.

It is thus again submitted that, at the very most, the only "judicial scrutiny" required of a stipulation for entry of judgment for back wages under this Act *at that time* could have as to the three factors of jurisdiction, fact of consent and fraud, with the possible added factor whether there had been a compromise of some issue of law, and that upon finding these factors to be satisfied a court had both the power and the duty to enter judgment based on the stipulation—this without requiring either stipulation or proof as to the facts, although this additional alleged requirement was also satisfied in this case according to appellee's own representations to the trial court, as set forth above. Thus in *Fleming v. Salem Box Co.* (D. Or.) 38 F. Supp. 997, Judge Fee never inquired into any of the additional factors now urged by appellee.

As for appelle's further statement (P. 19) that it never retreated from its position that payments were to be conditioned upon entry of judgment, it should be noted that in the lower court appellee offered evidence

admitting that the amount of the proposed judgment was "agreed to be owing" (R. 98-99), joined with plaintiff in asking that such a judgment be entered, indicated its willingness that judgment be entered even as late as July 3, 1950 (R. 171) and while it has never paid the amounts "agreed to be owing" it never on the record denied liability therefor or objected to the entry of judgment as stipulated until it filed its brief in this Court.

5. *So-called "Analogies" urged by Appellee Fail to Support Power of Courts to Refuse to Enter Judgments on Stipulation under Fair Labor Standards Act, but Established Rules of Law Support Both Power and Duty to Enter such Judgments.*

Appellee next (pp. 20-22) contends that the refusal to enter judgments on stipulation under the Fair Labor Standards Act in the absence of proof or stipulation setting out the facts are supported by the following so-called "analogies": (1) that the Supreme Court of the United States may refuse to decide important cases involving complex issues arising on *summary judgment* based on affidavits and exhibits alone because of the "probable effect" of such a decision on other persons similarly situated, (2) that the courts may also refuse to decide important questions affecting third persons by declaratory judgment proceedings without detailed findings of fact, and (3) that consent judgments entered before any testimony has been taken are by express provision of the Anti Trust Laws distinguished from other judgments as to their use as prima facie evidence.

But the rules stated under these "analogies" rest on far different principles than those governing the entry of judgments on stipulation. Thus both summary judgments and declaratory judgments normally arise only in cases of *contested* litigation where one party is opposing entry of such a judgment and the judgment so entered will not only be binding on him over his protest but will also be regarded by the courts under the doctrine of *stare decisis* as a precedent controlling the merits of decisions in other similar cases involving other parties. On the other hand, a judgment entered on consent or stipulation, while binding on the parties, binds no one over his protest, because consented to, and has no standing as a precedent controlling the decision of other cases between other parties, at least as to the merits of the case, as to which there was no contest, since a decision is only authority for what it actually decides.

As for the admittedly even "more distant" analogy involving the distinction by provisions of Anti-Trust Laws between the effect of consent judgments "entered before any testimony has been taken" and other judgments, the only inferences that can properly be drawn are: (1) the recognition of a practice of entering consent judgments before and without taking any testimony whatever, and (2) an admission that in absence of express provision by statute such consent decrees would be regarded from the standpoint of *evidence* to the same effects as other judgments.

But appellee need not go so far afield for distant analogies. The well-established rules of law that it is the

duty of the courts to uphold agreements of settlement in the absence of fraud or mistake, without regard to what the result might or would have been had the parties chosen to litigate; that the parties to a pending case may stipulate to entry of judgment and agree on any legal disposition of a case and it is then the *duty* of the courts to enter judgment accordingly, and the spirit and provisions of Rule 68 of the Federal Rules of Civil Procedure furnish far more compelling precedents for requiring the entry of judgment in this case than any of the distant "analogies" relied upon by appellee (see Apts.' Op. Br. pp. 13-24). Moreover, the action of appellee itself in urging the entry of judgment in the lower court and in submitting a brief contending that a proper showing of facts had been made to support the entry of judgment on stipulation (App. A) speak more eloquently than any "analogy" and bars appellee from taking a contrary position to oppose the entry of judgment on appeal.

C. The District Court Erred in Refusing to Enter Judgment as Stipulated.

Before considering the contentions of appellee that on December 20, 1946, the court did not err in refusing to enter judgment as stipulated it should be noted that appellee makes no attempt whatever to answer, and thus must be taken as in agreement with the points, authorities and arguments set forth in appellants' opening brief, pages 26 to 41. Yet the points considered by this portion of appellants' brief constituted the greater part of those relied upon by Judge Fee in his opinions

to support his position that he had no power to enter judgment based on stipulation in this case. If, as must be deemed admitted by appellee, these contentions by Judge Fee were completely untenable, it follows that by proceeding on such untenable theories in exercising what he considered to be discretionary powers, the dismissal of this cause by Judge Fee requires reversal on this ground alone. *United States v. Fischer,* supra.

1. *Jurisdiction was properly established in this case.*

Appellee contends (pp. 22-5) that jurisdiction was not properly established in this case for the reasons that diversity of citizenship was not proved; that the claims of appellants cannot be aggregated to satisfy the jurisdictional amount of $3000; that sufficient facts were not shown by stipulation or otherwise to establish coverage under the Fair Labor Standards Act; that there were then doubts whether cost-plus-a-fixed-fee contractors were covered by the Act, and that the later decision in *Powell v. U. S. Cartridge Co.,* 339 U.S. 497, did not make erroneous the decision in this case on December 20, 1946.

Appellants will not repeat arguments set forth above (pp. 11-2) demonstrating that the court had ample jurisdiction over this case as one arising under the Fair Labor Standards Act and to enter a consent decree therein. Also, while it is true that jurisdiction cannot be conferred by consent, it is established law that where jurisdiction depends upon facts, the parties may agree upon

facts which sustain jurisdiction. *Pitts. Cinn & St. Louis Ry. Co. v. Ramsey,* 89 U.S. 322, 327; *Harlee v. City of Gulfport,* 120 F (2d) 41, 43; *Murphy v. Sun Oil Co.,* 86 F (2d) 895, 896. It is thus significant that appellee in its brief to the lower court urged that it had ample jurisdiction to enter a consent decree in this case (Ap. 63 and 64) and that there had been an ample showing of facts by hearing, stipulation and admissions to establish coverage of the case under the Fair Labor Standards Act (Ap. 61 and 62).

It is also established law that where, as here, the court has general jurisdiction over the subject matter (as in a case arising under a law regulating commerce) a defendant who admits or does not object to jurisdiction will not be heard later to challenge such jurisdiction. *United States v. Kiles,* 70 F (2d) 880, 881; *Lambert v. Yellowley,* 4 F (2d) 915, 918, aff. 71 L. Ed. 422; *United States v. Edwards,* 23 F (2d) 477, 480; *William H. Perry Co. v. Klosters Aktie Bolag,* 152 Fed 967, 969; *Strauss v. U.S. Fidelity & Guaranty Co.,* 63 F (2d) 174, 179, cert. den. 77 L. Ed. 492; *O'Malley v. United States,* 128 F (2d) 676, 685; *United States v. Clarke,* 87 U.S. 92, 108. This is particularly true where, as here, defendant joined in asking that the trial court take jurisdiction of the case. *cf. Iselin v. LaCoste,* 147 F (2d) 791, 795; *In re Stevenson,* 45 F. Supp. 709, 711.

Appellee complains (p. 23) that insufficient facts were stipulated to show coverage under the Act upon the various questions raised by the Court. But the question of coverage under the Act goes to the ultimate

merits of the case and is entirely distinct from the initial question of jurisdiction, which depended solely upon whether the case arose under an act regulating commerce. And even if these questions of coverage went to the jurisdiction of the court, they were wholly satisfied by stipulations and representations of defendant that it was engaged in the production of goods for commerce and covered by the Act (App. 61) and that it could not deny but that each of plaintiffs spent at least some time each week in activities covered by the Act (App. 62). Again, having admitted such facts and having requested the Court to take jurisdiction, appellee cannot now be heard to the contrary.

As for the contention (p. 24) that on December 6, 1946, there was then a doubt whether such cost-plus contractors were covered by the Act—again the answer is that appellee represented to the trial court that its operations were covered by the Act (Ap. 61) and the later decision in *Powell v. U.S. Cartridge Co.,* supra, (which appellee admits (p. 25) is a "definite answer on this aspect of the coverage question") must be taken as controlling over the decision of the trial court even on December 20, 1946, for the reason that on appeal the correctness of that decision is to be determined by the law as of the time of decision on appeal. *McClosky & Co. v. Eckart,* 164 F (2d) 257, 259.

2. *"Existence of a Claim" was Adequately Established, Although not Necessary for Entry of Judgment on Stipulation.*

Appellee next (p. 25) contends that entry of judgment on stipulation was properly refused because the "existence of a claim was not adequately established" in that it was not shown that each appellant worked 30 minutes in response to roll call requirements; that at best there was a conflict of testimony whether they worked from a few minutes to a maximum of 30 minutes which, "when rejected by the trial court", does not constitute a factual basis for the existence of a valid claim; and that a settlement based on compromise of a claim "known to be invalid" is unenforceable.

In the first place, it is not clear on just what authority appellee contends that the "existence of a claim" is a proper factor to be considered on entry of judgment on stipulation. Appellee first admitted (p. 9) that as a general rule settlements will be upheld even though a different result might follow from a trial. The four factors upon which appellee claimed (p. 11) that proof is necessary before entry of such a judgment do not include "existence of a claim." The alleged requirement (p. 17) of "judicial scrutiny" in Fair Labor Standards Act cases can, as shown above, mean only as to the factors of jurisdiction, fact of consent, fraud, and, at the most, the existence of a bona fide dispute and absence of compromise on any question of law, such as of coverage. Thus no basis has been established for this alleged additional requirement.

Next, while it is true that there was a conflict of testimony as to the exact amount of time worked by appellants, payment was to be made for 15 minutes each day,

instead of 30 minutes, as claimed by appellants, and appellee represented to the trial court that this conflict was typical of any case (Ap. 50) ; that their own witness estimated the time as varying from 5 to 30 minutes each day (Ap. 50) ; that there was a disputed question of fact as to the time worked (Ap. 56) ; that in reaching a settlement of this dispute under which appellants were to be paid for 15 minutes each day, with overtime and liquidated damages the parties "acted reasonably (and) fairly;" (Ap. 57) and that the Court had full power to enter judgment pursuant to the stipulation of settlement (Ap. 64). Furthermore, the Court did not reject the proposed settlement on this basis at all, but found that it was "fair and regular" (R. 105).

Indeed for appellee, in view of its own previous representations to the trial court, to now suggest to this court (p. 26) that the existence of a claim in this case was not adequately established and that this settlement was "based on the compromise of a claim known to be invalid" is not only shocking but typifies the complete reversal of position by appellee and the extent to which it is willing to go in order to defeat on appeal the entry of the same judgment as to which it once stipulated and which it joined in requesting in the trial court in order to make payment of amounts "agreed to be owing" (R. 98-99).

3. *The Settlement was Found to be Fair and Reasonable and thus Not Against the Public Interest.*

Appellee next (p. 26) contends in the same vein that facts supporting coverage were not offered to the satisfaction of the court and that refusal to approve the settlement was not error *if* it involved a compromise of coverage; that the court was also justified in rejecting the formula for settlement of the entire group of claimants in "wholesale manner" and that the public interest of the case was accentuated because the ultimate burden of the judgment would rest on the United States.

But, as we have seen (supra, 18) appellee had expressly represented that there was no dispute as to coverage and the existence of coverage was adequately shown, even if a proper factor for consideration in entry of a judgment on consent, which appellants deny. Moreover, appellee represented that the so-called "wholesale" formula used for settlement was entirely fair and reasonable under the circumstances (Ap. 57), and the court expressly found the settlement to be "fair and regular" (R. 105) and clearly did not reject the settlement because of the formula adopted by the parties, even if the fairness of the settlement was a proper factor for consideration, which appellants also deny.

As to the liability of the United States to make ultimate payment of any judgment, there are no facts of record in this case to make such a determination and the United States Attorney was careful to reserve the right to any such claim (R. 94). But since the United States Maritime Commission consented to the settlement and admitted that the amounts sought by judgment were "agreed to be owing" (R. 98-99) and since Congress

subsequently by the Portal-to-Portal Act, 29 U.S.C.A. sec. 253, expressly authorized and approved previous compromises of all actions under the Fair Labor Standards Act, so long only as there was a bona fide dispute as to the amount payable by the employer, which was clearly present here (as demonstrated below), there is no room left for argument that such a settlement can properly be rejected as not in the public interest (see also Apts. Op. Br. p. 45-6), even if this was also a proper factor for consideration on entry of judgment on stipulation, which appellants also deny.

II REPLY TO ARGUMENT THAT COURT DID NOT ERR IN DENYING MOTIONS FOR JUDGMENT ON STIPULATION, OR FOR SUMMARY JUDGMENT OR TO FILE SUPPLEMENTAL COMPLAINT.

A. Reply to Argument that Motion for Judgment on Stipulation Properly Denied.

1. *Rule* 68, *Fed. Rules Civ. Proc., is Applicable to this Case, at Least in Policy Therein Expressed.*

Appellee contends that Rule 68 is concerned only with costs and has no bearing on entry of a consent judgment, citing *Maguire v. Fed. Crop Ins. Corp.,* 181 F. (2d) 320. But even though, from the standpoint of the ordinary *defendant,* the purpose of Rule 68 is its effect upon costs, its important effect, so far as this case is concerned, is that regardless of the nature of the action,

whether under the Fair Labor Standards Act or not, and regardless of questions of jurisdiction, authority to compromise, fraud, existence of dispute or claim, and fairness or public interest, the parties are enabled by this rule, upon settlement of a pending case, to have judgment entered *automatically* by the clerk and without "judicial scrutiny" by the trial judge. Thus Rule 68 has *direct* bearing upon entry of a consent judgment and provides a procedure expressly suited for that purpose. The *Maguire* case involved an *unaccepted* offer of compromise. In this case, however, there was a consummated settlement and plaintiff then requested entry of judgment in the exact form to which defendant had stipulated. Thus both the provisions and the spirit of Rule 68 entitle plaintiff to the entry of such a judgment. (See also Apts.' Op. Br. 24)

2. *No Grounds Remained for Refusal to Enter Judgment.*

Appellee next (p. 28) repeats the same alleged grounds for refusal to enter judgment on motion for entry of judgment as urged as grounds for the previous refusal of the court to enter judgment. No purpose would be served by repeating arguments set forth above demonstrating that such claims as alleged lack of jurisdiction, alleged lack of a claim and alleged failure to meet the public interest never constituted grounds for refusal to enter judgment as stipulated by the parties. For the same reasons that such claims fail to sustain the decision of December 20, 1946, they likewise fail to sustain the decision of July 30, 1950, with the added reasons

that (1) During the interval the coverage of cost-plus contractors under the act had been made clear by the *Powell* decision, supra, and (2) Section 3 of the Portal-to-Portal Act (29 U.S.C.A. sec 253) expressly ratified all previous settlements of actions under the Fair Labor Standards Act, provided only that there was a "bona fide dispute as to the amounts payable;" which was clearly satisfied in this case for reasons set forth below and in appellants' opening brief (pp. 45-6).

Appellee contends (p. 29) that section 3 of the Portal-to-Portal Act applies so as to approve compromise settlements *only* if there are no disputes of law, such as over coverage. But in this case appellee conceded in the trial court that there was no dispute over coverage in this case, but only one over the amount of time worked (App. 18). Moreover, and of more importance, it is clear beyond doubt that section 3 was intended to sanction compromise settlements "if there exists a bona fide dispute as to the amount payable" regardless of whether arising from a dispute of law over coverage or one of fact as to the time worked, and at least in the later case, even though a dispute over coverage was also involved. See *Knudsen v. Lee & Simmons,* 89 F. Supp. 400, at 402 and *McClosky & Co. v. Eckart,* 164 F. (2d) 257, 259. Thus Rep. Walter, in explaining sec. 3 on behalf of the House Committee in charge of the bill, stated that

> "It should be understood that the intent here is to permit compromises when there is a bona fide dispute as to the amount payable *based upon an issue*

> *of law, not only where the dispute is based upon issues of fact.* In other words the intent is to permit a compromise where the dispute as to the amount due arises out of issues of law, such as coverage or exemptions, as well as issues of fact, such as the wage rate or hours worked'' (93 Cong. Rec., [5-1-47] House, p. 4389).

See also *"The Portal-to-Portal Act of* 1947'' (B.N.A., 1947) pp. 24-25; F-1-9 and F-5; and Apts' Op. Br. p. 46.

Appellee also states (p. 29) that the settlement in question violates provisions of section 3 requiring that settlements must require payment of not less than time and one-half the "minimum hourly wage rate" since in some cases the claimants agreed to accept "amounts less than the overtime wages *demanded".* But the above provision of section 3 clearly refers only to the *minimum* rate of 40 cents per hour then payable under the Act in question, here section 6 of the Fair Labor Standards Act. (See *Interpretation Bulletin, U. S. Dept. of Labor, "General Statement as to the Effect of the Portal-to-Portal Act of* 1947", etc., issued Nov. 18, 1947, pp. 35-6.) But there never was any contention that this settlement involved any payments at rates less than the minimum of 40c per hour then effective under that Act and the settlement was computed at time and one-half the regular hourly rates for each of the employees involved for 15 minutes each day (App. 57) and such hourly rates ranged from 95c to $1.20 per hour (see original complaint and supplemental complaint, also R. 61, 83 and 90). *Stillwell v. Hertz Drivurself Stations,* 174 F (2d) 714, cited by appellee, did not involve this problem in any way.

3. *The Portal-to-Portal Act Expressly Authorized and Ratified the Settlement in this Case.*

Coming now to what appellee apparently regards as the strongest point of its brief—the result of the Portal-to-Portal Act of 1947. Appellants are glad to accept the challenge of this as the "most glaring and overriding defect" claimed by appellee (p. 30), since if this charge proves false it follows that the remaining points made by appellee are regarded by it as having even less merit.

In substance, the contention of appellee is as follows (a) that section 2 of the Portal-to-Portal Act is an amendment to the Fair Labor Standards Act completely destroying all claims for compensation under that Act for "portal-to-portal" activities unless based on contract or custom, (b) that section 3 of the Portal-to-Portal Act, by limiting authorization and ratification of settlements to causes of action under the Fair Labor Standards Act *as amended,* extends only to settlements of causes of action other than those destroyed by section 2, (c) that therefore section 3 does not authorize or ratify settlement of claims for compensation for "portal-to-portal" activities, and (d) that this action involves such a claim, with the result that section 3 does not authorize or approve the settlement of this case, but on the contrary outlaws such a settlement.

The complete fallacy of this argument is apparent for two reasons:

(a) The reference in section 3 to causes of action un-

der the Fair Labor Standards Act "*as amended*" was to that Act as amended *prior* to passage of the Portal-to-Portal Act and not to any limitations imposed by section 2. (Cf. Sec. 3 with Sec. 2, 1 and 5; 29 U.S.C.A. Sec. 253, 252 and 216, as amended. Conf. Rep. No. 326 and House Rep. No. 71, 80th Cong. 1st Sess.)

(b) It was not only intended that Section 3 authorize and ratify settlements of *any* cause of action or action under the Fair Labor Standards Act, but *it was expressly intended to authorize and ratify settlements of the very type of "portal-to-portal" claims outlawed by section 2* in the absence of such settlements. (See statement by Sen. Donnell, Cong. Rec. 80th Cong., 1st Sess. p. 2180; Cong. Rec. pp. 2127, 4388, 4389 and 4372; S. B. 70; H. B. 2157; S. R. 37, p. 47; S. R. 48, p. 46; H. R. 71; p. 8 and Conf. R. 326, 80th Cong. 1st Sess.) As stated by Sen. Donnell:

> "We feel, however, that in the case of *these surprise liabilities, liabilities which industries did not expect, which neither management nor employees expected, it is entirely proper and is conducive to disposing of such cases with expedition and dispatch that there should be the power to make settlements, compromises, and releases or satisfaction of claims.*"

(93 Cong. Rec., [3-18-47] Senate, p. 2180.)

For a more detailed statement of the facts and

references in support of these two points see Appendix C of this brief.

It is thus clear beyond doubt that appellee's contention that section 3 does not authorize or approve settlement of "portal-to-portal" claims, is fully as false and without foundation as are the other contentions of appellee. Thus assuming, without admitting, that this case involves a "portal-to-portal" claim, the provisions of section 3 not only fail to exclude the settlement of such a case, as contended by appellee, but expressly authorize and ratify the settlement of such a case. Also, even though, as appellee contends (p. 32) the court was deprived of jurisdiction to award relief in a contested case involving a "portal-to-portal" claim outlawed by section 2 (such as in cases cited by appellee, p. 32), section 3 of the same Act expressly provides that a different rule shall be applicable to uncontested cases in which settlements have been reached. Thus section 3 (a) authorizes settlement of *any action* to enforce a cause of action under the F.L.S.A., including "portal-to-portal" claims, section 3 (d) expressly ratifies any and all previous compromises or settlement of such an action and section 3 (c) provides that any such compromise or settlement shall be a "complete satisfaction of such cause of action."

It is thus clear that section 3 limits the otherwise broad effects of section 2 and either reserves power in the courts to approve and enter judgments pursuant to the settlement of then-pending actions or authorizes the courts to do so, since the right conferred by section

3 to settle pending actions would be meaningless without power in the courts to enforce such settlements and to enter judgments pursuant to such settlements. To hold, as would be the necessary result of appellee's contiontions, that even if then-pending actions could be subject to valid and enforceable settlements, the courts have no jurisdiction to enter judgments pursuant to such settlements or to otherwise enforce them would be "to infer Congressional idiosyncracy" which is never proper, particularly where a "more sensible explanation" is available, as set forth above. Cf. *Keifer & Keifer v. R. F. C.,* 306 U.S. 381, 393.

Appellants state (p. 33) that a judgment is founded on "some antecedent obligation or contract", is only "higher evidence" of the contract (or obligation), but does not change its "essential character", so that in deciding how far it may be affected by legislation one "must look mainly to the original contract" (or obligation), citing *Blount v. Windley,* 95 U.S. 173, 176. Conversely, if the original contract or obligation was valid and unaffected by legislation, then no reason exists why judgment should not be entered as "higher evidence" of the original contract or obligation. Here, even prior to the Portal-to-Portal Act, settlements of disputes under the F.L.S.A. to pay for "portal-to-portal" work were valid, at least if within the limits of the *Schulte* and *O'Neil* cases. Under section 3 of the Portal-to-Portal Act such settlements were expressly authorized and ratified. Thus no reason exists under the rule of the *Blount* case why judgments should not be entered as "higher evidence" of such settlements.

Appellee next (p. 33) cites *Walling v. Miller,* 138 F (2d) 629, for the proposition that if a court does not have jurisdiction over a cause it lacks power to enter a consent decree. But since, for the reasons above stated, section 3 expressly authorizes settlements of then-pending actions for "portal-to-portal" claims, thus reserving jurisdiction over such actions, and since section 3 also "expressly sanctions" a stipulation of settlement in such a case, to use the language of the *Walling* case, it follows that the courts also have power to enter consent decrees as "higher evidence" of such stipulations of settlement.

From the foregoing it is clear that sec. 3 of the Portal-to-Portal Act completely validates all compromise settlements under the Fair Labor Standards Act made prior to May 14, 1947, including settlements of actions then pending under that Act, provided only (1) that there was a bona fide dispute as to the amount payable arising either from an issue of fact or of law, (2) that payments under the settlement were at rates not less than time and one-half the statutory minimum wage rate, and (3) that there was no fraud or duress. It also follows that the other so-called "requirements" contended for by appellee, such as "lack of a claim" and "failure to meet the public interest" are by the express provisions of section 3 completely eliminated as factors which can properly be considered in passing upon the validity of such settlements under the Fair Labor Standards Act. Since there can be no doubt but that the three requirements set forth above were satisfied in

this case, it must follow that the settlement and stipulation for judgment in this case have been ratified and approved by Act of Congress, with the result that it should likewise be approved by this Court by entry of judgment as previously stipulated and in the amount "agreed to be owing". It is submitted that any other result would do violence to both the spirit and express provisions of section 3.

B. Reply to Argument that Motion for Summary Judgment Properly Denied.

Appellee contends (p. 37) that lack of jurisdiction furnished a proper basis for denial of this motion. But for reasons stated above there was no lack of jurisdiction and denial of the motion was thus improper (See also Apts.' Br. 48).

C. Reply to Argument that Motion for Leave to File Supplemental Complaint Properly Denied.

Appellee has devoted considerable space (pp. 37-43) to the question whether the trial court should have allowed the filing of a supplemental complaint, which is quite independent from and in no way controlling over the primary question whether the court should have entered judgment either originally upon the stipulation and joint request of the parties or subsequently upon motion of appellants. Indeed appellants are not so much concerned over the denial of their motion to file

a supplemental complaint, as such, as with the fact that the basis upon which Judge Fee rested his decision might be urged as a bar to recovery upon the compromise and settlement either by way of supplemental complaint or by later independent action or actions. For these reasons appellants are content to rest upon the arguments of their original brief in support of their right to file a supplemental complaint, as fortified by the further points and authorities set forth in Appendix D hereof, in answer to the contentions of appellee.

III. REPLY TO ARGUMENT THAT DISMISSAL FOR ALLEGED WANT OF PROSECUTION PROPER.

After stipulating to and jointly requesting entry of judgment for amounts "agreed to be owing" and after, on January 3, 1950, expressly disavowing any request that the case be dismissed for want of prosecution (R. 166) and even as late as July 3, 1950, reiterating to the trial court its willingness that such a judgment be entered (R. 171), appellee would now offer contentions that appellants did not exercise proper diligence and that dismissal for alleged want of prosecution was proper. Again appellants submit that appellee is barred by its position in the lower court from now taking such a position. But to consider the merits of the points raised by appellee in support of the dismissal of this case.

A. Power of the District Court.

It must, of course, be conceded, as contended by appellee (p. 43), that the District Courts have inherent power to dismiss for want of prosecution. On the other hand, however, it must also be conceded by appellee that such power is not unlimited and that where improperly exercised or abused the District Courts will be reversed.

B. Grounds for Reversal for Abuse of Discretion.

It is true, as next contended by appellee (p. 44), that ordinarily the dismissal of a case for want of prosecution will not be reversed except in case of abuse of such discretion. On the other hand, appellants contend that on dismissal for alleged want of prosecution such discretion will be considered as having been abused: (1) When such a dismissal would defeat the ends of justice, as where it is admitted that a substantial amount is probably due (Apts.' Br. 53-6); (2) Where exercised upon an untenable theory, since discretion requires the discernment of the course prescribed by law (p. 53 and 70); (3) Where delays are excused or have been acquiesced in (p. 58-60); (4) after trial or where proceeding to trial would be futile (p. 60-2); (5) Where the case has been taken off the calendar, or has been reinstated after threatened dismissal and before the case has been reached again, or where the case is pending on motion (pp. 65-7); (6) Where delays have been caused by arrangements looking toward settlement (p. 68) or (7) Where there has been a stipulation for entry of judgment (p. 70).

Appellee has not denied that contentions (1), (2) (4) and (5) are proper and exist in this case. Since any one of such contentions is alone sufficient to demonstrate reversible error and since they all stand unrefuted in this case, it is submitted that these grounds alone require reversal of the action by Judge Fee in dismissing this case for alleged want of prosecution. In addition, appellee does not deny that presence of any of the remaining items (with the possible exception of item 7) would require reversal for abuse of discretion, although apparently denying their existence in this case. Now to discuss the points raised by appellee in contending that dismissal was not an abuse of discretion in this case.

C. Reply to Argument that No Abuse of Discretion in this Case.

1. *The Ruling of January 3, 1950, is One Ground Demonstrating Abuse of Discretion.*

Appellee contends (p. 44-5) that simply because Judge Fee prefaced his then-stated decision not to dismiss the case of his own motion with the words *"I think,"* his statement cannot be considered as a ruling. But whether or not a ruling was or was not made is not dependent on these words, but upon the entire frame of reference. A court will be deemed to have ruled on admissibility of evidence, for example, despite the fact that he may have said *"I think* that I shall overrule the objection," if he says no more and then allows the evidence to come in. Similarly, in this case, dismissal for

lack of prosecution had been suggested on Dec. 12, 1949 (R. 162-4) and appellants had on Dec. 19, 1949, filed an affidavit justifying the delays (R. 145) as well as motions for entry of judgment, etc. (R. 143). At the time of hearing on January 3, 1950, on the motions and before proceeding to argue them appellants first raised the specific question whether the court was satisfied that the case should not be dismissed for alleged lack of prosecution, calling attention to the affidavit and to the fact that appellee did not join in such a request for dismissal (R. 165-6). Not only did the Court then make the statement in question indicating his decision not to dismiss the case on his own motion, but then permitted argument on the merits of the motions presented, raised a further question on the merits on his own motion, stated that he would *"give you time to look this over"* and permitted the filing of briefs on that question (R. 166-170).

It is thus clear, taking the entire "frame of reference" into consideration, that Judge Fee ruled at that time that he would not dismiss the case on his own motion; that appellants and appellee both so understood at that time; that appellants, in reliance on this ruling, proceeded with argument on their motions, thus foregoing the opportunity to submit further testimony or other evidence explaining the delay or otherwise in opposition to such a dismissal and have thus been prejudiced, contrary to the suggestion of appellee (p. 45).

Appellants contend (p. 45) that even if the court be deemed to have made such a ruling he could later re-

verse himself. But appellee makes no attempt to dispute the statement in appellants' brief (p. 67) that:

> "It is likewise generally held that *once a case has been reinstated* after dismissal for want of prosecution, *it stands as though it had never been dismissed and* it *cannot, before being reached a second time, be dismissed for failure to prosecute.* 27 C.J.S., *Dismissal,* p. 274-5."

A fortiori, where there was never a dismissal for want of prosecution, after a ruling that a case would not be so dismissed it cannot properly be dismissed before being reached a second time and while pending decision on motions submitted on argument and briefs. Appellee next (p. 46) states that the findings of the court are uncontroverted and support the dismissal. But the findings are more significant for the facts which they omit than for those included. Nor do they contradict in any way any of the same grounds stated above (p. 40), any one of which requires reversal of this case for abuse of discretion.

2. *The Delays in this Case were Fully Explained and Acquiesced in by Both Appellee and the Court.*

Appellee next (p. 46) contends that *some* of the delays were not excusable. As to this question appellants will not repeat the discussion of their opening brief (pp. 56-59) fully explaining all delays. Of more importance, however, is the fact that appellee makes no attempt to deny the further contentions of appellants' brief (p. 59-60) that where delay has been *acquiesced* in by de-

fendant a case should not be dismissed for lack of prosecution and that in this case all delays were fully acquiesced in both by appellee and by the court.

3. *Failure to Press for Trial no Ground for Dismissal Where Trial Would Have Been Futile.*

Appellee, without challenging the proposition that dismissal for want of prosecution is improper where a trial would be futile (Ap. Br. 60) or that a trial in this case would have been completely futile in view of the decision by Judge Fee in December, 1946, (Id. p. 61-2), nevertheless contends (pp. 48-50) that appellants should have attempted to have the case set down for trial and urge that failure to do so was "an omen of lack of diligence." But since appellee itself contends (p. 50) that the question whether judgment should be entered on the stipulation would only present matters "already decided against the appellants" and that a trial on the merits of the original claim was barred by the Portal-to-Portal Act, it is obvious from appellee's own view of the matter that a trial on either question would have been completely futile, so far as the trial court was concerned. Thus failure to proceed to trial in this case, instead of showing lack of diligence, reflected only a realization of the futility of the situation. Since trial would thus have been admittedly futile, the uncontroverted rule that in such a case dismissal for want of prosecution is improper requires reversal of the dismissal of this case on this ground and review by this Court of the merits of questions decided by Judge Fee.

The final contention by appellee (p. 50) is that the Portal-to-Portal Act destroyed the basis of appellants' original claim, in absence of amendment satisfying the requirements of section 2 of that Act and that "the nonexistence of a meritorious claim is of added weight in favor of the propriety of a dismissal for want of prosecution." But the passage of that Act imposed no affirmative duty on litigants to amend *unless* they elected to proceed on the merits of their original claim under the Fair Labor Standards Act. On the other hand, where, as here, plaintiffs had agreed upon a compromise and settlement, with stipulation for entry of judgment, they were entitled to elect not to proceed on the merits of their original claim and, in fact, may well have been unable to satisfy the requirements of section 2 in order to do so. Thus in such a case plaintiffs were fully entitled to and did at least upon passage of the Portal Act, elect to stand on their settlement and to continue to seek entry of judgment thereon particularly since as demonstrated above, section 3 of that Act expressly authorized and ratified the very basis upon which appellants in this case originally sought entry of judgment—namely, by authorizing and ratifying settlements of such previously existing actions.

It follows that instead of having a non-meritorious claim as contended by appellee (p. 50) appellants have a *meritorious* claim, particularly since appellee stipulated to the entry of judgment and had offered evidence admitting the sums involved were "agreed to be owing" (R. 98-9). Therefore the converse of the rule suggested by appellee (p. 53-4) is applicable to this case and the

uncontroverted rule that a case should not be dismissed for lack of prosecution where it appears "that a substantial amount was probably due" (Apts. Br. 54) furnishes a final compelling reason for holding that the trial court abused its discretion in dismissing this case.

CONCLUSION

For the reasons set forth above it is submitted that the decision of the lower court should be reversed and that judgment should now be entered by this Court as stipulated by the parties and "agreed to be owing," with interest thereon.

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APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

(Title of Case Omitted.)

DEFENDANT'S MEMORANDUM IN SUPPORT OF PROPOSED SETTLEMENT

I

INTRODUCTORY STATEMENT

This memorandum is submitted for the consideration of the Court pursuant to the proceedings had in the above matter on May 13, 1946, at which time the Court raised the question as to whether, in view of the opinion issued by the Supreme Court of the United States on April 29, 1946, in deciding the case entitled *"D. A. Schulte, Inc. v. Salvatore Gangi, Etc."* (14 U.S. Law Week 4339), the Court had power to enter a judgment pursuant to the stipulation of the parties in the present case.

The defendant respectfully submits that under the circumstances of the present case this Court has full power to approve the settlement and to make and enter a judgment pursuant to the stipulation of the parties. In support of that position, the defendant submits the following considerations.

II

THE FACTUAL SITUATION

By the complaint and supplemental complaint in this case, 52 men who were employed as guards at the Swan Island shipyard of the defendant seek to recover on the claim that each of them was required to report for roll call, inspection and other duties thirty minutes in advance of going on patrol on their beat, and that this time was not included by the defendant in making its wage payments. The complaint was filed on December 8, 1945 and the supplemental complaint was filed on January 30, 1946. Thereafter, defendant filed a general denial of the plaintiffs' claims.

On April 19, 1946 a stipulation for judgment was presented to the Court with a request that judgment be entered pursuant to said stipulation. The stipulation covered 50 of the 52 claimants and recited that certain questions of fact and law had arisen with respect to the claims of the plaintiffs, these recitals being set forth in paragraph 4 of the stipulation, which reads as follows:

> "Questions of fact and of law have arisen with respect to the claims of plaintiffs against defendant referred to in the complaint and the supplemental complaint herein regarding: (1) the number of hours, if any, in excess of forty (40) hours per week worked by plaintiffs, and each of them, for defendant; (2) the amount of time, if any, which plaintiffs, and each of them, were compelled to spend in reporting for roll call, inspection, and other duties before or after the time spent in the performance of their regular duties as described in Paragraph

> IV of the complaint; (3) whether such time was time worked within the meaning of the Act; and (4) whether the nature of the work performed by plaintiffs was such as to entitle them to the benefits of the Act;"

The stipulation then went on to recite that a bona fide controversy and dispute existed by reason of the matters just mentioned, between the parties with respect to the right of the plaintiffs to collect and receive and the obligation of the defendant to pay overtime compensation, liquidated damages, attorneys' fees and costs under the provisions of the Fair Labor Standards Act; that the parties desired to settle and adjust this controversy and dispute in the manner provided in the stipulation and to agree upon the payments to be made to plaintiffs and their attorneys by defendant in full settlement and discharge of all of the claims of plaintiffs set forth in the complaint. Following these recitals, the stipulation provided that judgment should be entered by the Court in favor of the plaintiffs and against the defendant in the amounts stated on a schedule attached to the stipulation, which payments were to be in full satisfaction and discharge of all liability of the defendant to the plaintiffs under the Fair Labor Standards Act. There was a further provision for the payment of attorneys' fees and costs.

Hearings were held before this Court on April 19th and 22nd, 1946, at which hearings a number of the plaintiffs testified, as well as an employee of the defendant who advised the Court of the defendant's position with respect to the settlement.

In view of the fact that the defendant's operations were carried on under contracts with the United States Maritime Commission and that the amount of the judgment is subject to a claim for reimbursement by the defendant from the Government, the United States Attorney for the District of Oregon also appeared at the hearings and participated therein.

The testimony given at the hearings was typical of that which is to be expected in any litigation. The plaintiffs who testified stated that they were required to report one-half hour early every day during their employment for the purpose of roll call, inspection and other preliminary duties; although one of these witnesses conceded that for a time at least the periods required for the roll call and inspection might have been less than one-half hour. (All emphasis supplied.)

The testimony of defendant's representative, Mr. W. L. Tuson, contradicted the assertion of plaintiffs that they reported one-half hour early during every day of their employment. Mr. Tuson stated that originally the guards had been instructed to report one-half hour early, but that in actual practice this rule was not enforced, that the time was gradually cut down, and that in fact many guards reported simply at the beginning of the shift, or even reported late for work. He indicated that the time required for the roll call was a varying figure, running from five minutes to thirty minutes. Furthermore, Mr. Tuson testified that there were no existing records from which an exact determination of the time spent by the plaintiffs for roll call and inspection could be made at the present time.

At the conclusion of the hearings, *plaintiffs' attorneys indicated that all of the plaintiffs covered by the stipulation who had not appeared and testified had authorized the settlement provided for in the stipulation and would testify to substantially the same effect as the plaintiffs who took the witness stand.*

The Court thereupon took the matter under consideration and subsequently, on May 13, 1946, called upon the attorneys for the respective parties to appear, at which time the court stated that the testimony had indicated that the transaction between the parties was fair and regular and an appropriate settlement was arrived at which the Court would approve without question were it not for the problem as to whether, in the light of the Supreme Court's decision in the *Schulte* case, supra, the Court had power to approve the settlement.

We turn, then, to a consideration of the principles established by the Supreme Court in the Schulte case and the application, if any, of those principles to the present case.

III

THE PRINCIPLES OF THE SCHULTE CASE

The issue presented to the Supreme Court for decision in the *Schulte* case is stated by the Court in the following language:

"The primary issue presented by the petition for

> certiorari is whether the Fair Labor Standards Act precludes a bona fide settlement of a bona fide dispute *over the coverage* of the Act on a claim for overtime compensation and liquidated damages where the employees receive the overtime compensation in full." [1]

After reviewing the proceedings in the District Court and the Circuit Court of Appeals and stating the facts of the case, the Supreme Court proceeded to pass upon the issue stated above. It first held that it was unnecessary to determine whether the liability for unpaid wages and liquidated damages was unitary or divisible, stating that whether the liability was single or dual—

> " . . . we think the remedy of liquidated damages cannot be bargained away by bona fide settlements of *disputes over coverage. Nor do we need to consider here the possibility of compromise in other situations which may arise, such as a dispute over the number of hours worked or the regular rate of employment.*"

The Court then went on to say that the reasons which led it to its conclusion with respect to "compromises of real *disputes over coverage*" do not differ greatly from those set forth in its decision in *Brooklyn Savings Bank v. O'Neil* (1945), 324 U.S. 697, and after quoting from the *O'Neil* case the Court continued:

> "In a bona fide adjustment *on coverage,* there are the same threats to the public purposes of the Wage-Hour Act that exist when the liquidated damages are waived. . . ."

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[1] Underscoring ours unless otherwise noted.

Again, in the next and final paragraph of the Court's decision on this issue, the Court stated that it thought the purposes of the Act led to the conclusion "that neither wages nor the damages for withholding them are capable of reduction by compromise of *controversies over coverage.*"

From the foregoing quotations it is plain that the issue before the Supreme Court in the *Schulte* case was whether a dispute as to coverage (i.e., the application of the overtime provisions of the Act to particular employees) could be the subject of a valid settlement or compromise. The Court expressly recognized this limitation in its own statement of the issue, as noted above, and repeatedly referred to "disputes over coverage", "bona fide adjustments on coverage", and "controversies over coverage". Most important of all, by its language the Court expressly excepted from the application of its decision cases involving a factual issue, "such as a dispute over *the number of hours worked* or the regular rate of employment."

It must be noted, too, that in Footnote 8 of the Opinion, the Court summarized certain contentions made by the employer (the petitioner) and in that connection had the following to say:

> "Settlements of controversies under the Act by stipulated judgments in this Court are also referred to by petitioner. North Shore Corporation v. Barnett et al., 323 U.S. 679.
>
> "Petitioner draws the inference that bona fide

> stipulated judgments on alleged Wage-Hour violations for less than the amount actually due stand in no better position than bona fide settlements. Even though stipulated judgments may be obtained, where settlements are proposed in controversies between employers and employees over violations of the Act, by the simple device of filing suits and entering agreed judgments, *we think the requirement of pleading the issues and submitting the judgment to judicial scrutiny may differentiate stipulated judgments from compromises by the parties.* At any rate the suggestion of petitioner is argumentative only as no judgment was entered in this case."

The statement of the Court with respect to the distinction between compromises by the parties and settlements of controversies by stipulated judgment is important in view of the fact that in the *Schulte* case the facts involved a situation in which the employer and the employees had gotten together and arrived at an agreement, pursuant to which the employer paid overtime compensation in consideration of a general release. Here, on the other hand, suit has been filed, the defendant has entered its denial, extensive negotiations between the attorneys for the parties has ensued, and ultimately a stipulation for judgment has been agreed to which has been submitted to the Court for judicial scrutiny.

Bearing in mind the fact that *the Supreme Court by its very language limits the principles of the Schulte decision to disputes over coverage, recognizes that disputes over hours worked or regular rate of pay involve different considerations and that cases involving re-*

leases negotiated between the parties are to be distinguished from cases involving stipulated judgments requiring the pleading of the issues and submitting the judgment to judicial scrutiny, we now turn to the question as to whether the *Schulte* decision is applicable in the present case so as to deny the power of this Court to approve a settlement which it has stated to be fair and regular.

IV

THE SCHULTE DECISION DOES NOT DEPRIVE THE COURT OF JURISDICTION TO APPROVE THE SETTLEMENT INVOLVED IN THE PRESENT CASE.

A dispute over coverage involves the issue as to whether or not a particular employee is doing work of such a character as to entitle him to the benefits of the Fair Labor Standards Act. In the *Schulte* decision, the Supreme Court has said that a dispute of that character cannot be the subject of a compromise, even though the employer acts in good faith in disputing the application of the Act. It is plain that there can be differences of opinion with respect to the soundness of the Court's ruling that a bona fide dispute with respect to coverage cannot be the subject of a compromise; no better evidence need be suggested than the fact that the trial court, one of the Justices of the Circuit Court of Appeals, and the late Chief Justice and two of the Associate Justices of the Supreme Court took a view contrary to that of the Court's majority. Be that as it may, the majority's decision is now the law. The question here

is whether the view of the majority applies to the present case.

We respectfully submit that the principles of the Schulte case have no application to the present case. We believe that the testimony which this Court heard on April 19th and 22nd *made it abundantly clear that the real issue here is "a dispute over the number of hours worked."* The testimony of the plaintiffs indicated that they assert that they were required to report for roll call one-half hour in advance of the commencement of their regular shift on each day that they worked. The testimony of defendant's representative controverted the plaintiffs' claim, and he asserted that the time ran from five minutes to thirty minutes. Here, as in practically every other law suit, was a disputed question of fact.

This dispute is something entirely different from a dispute with respect to the application of a law enacted by Congress. A dispute over coverage amounts to a denial of the existence of rights created by statutory enactment. Inasmuch as the Fair Labor Standards Act was enacted by Congress for the purpose of ensuring certain minimum compensation to workers, we recognize the validity of the Supreme Court's view that an employer cannot deny to his employees the rights which Congress has said they shall have by disputing, even in good faith, the application of the statutory benefits to particular employees. On the other hand, *we find nothing in the Fair Labor Standards Act or in the Supreme Court's decision in the O'Neil and Schulte*

cases indicating that the parties cannot sit down together and reach an agreement on disputed facts with respect to the measure of the plaintiffs' rights and the defendant's obligation to pay overtime.

In the present case, as Mr. Tuson testified, the amounts provided to be paid under the stipulation and the proposed judgment are based upon a computation which allows one-half hour per day at straight time or time and one-half, dependent on whether the additional time allowed threw the work week over 40 hours. To put it another way, what the parties have actually agreed to is the allowance of fifteen minutes time with the time and one half doubled so as to include both the overtime and the liquidated damages. *In effect, then, the parties have agreed that the plaintiffs shall be paid for fifteen minutes each day and shall receive overtime and liquidated damages based upon such time allowance. Bearing in mind the conflicting claims of the parties with respect to the measurement of the time and the lack of records which would obviously fix the time involved each day, we submit that the parties have acted reasonably, fairly, and in the interest of conserving the Court's time in entering into a stipulation fixing the amount to be recovered by the plaintiffs.*

We believe that the Supreme Court meant to preserve to the parties the right to enter into compromises with respect to "the number of hours worked or the regular rate of employment" when it said that such compromises were not considered in arriving at its conclusion that "disputes over coverage" could not be the subject

of a bona fide settlement. Throughout its decision, the Court time and again limits the language of the decision to disputes or controversies with respect to coverage.

We believe it is one thing to say that an employer cannot bargain with his employees as to whether or not the employees are within the inclusion of a Congressional act, but that it is something entirely different to say that, *conceding the application of the Act,* the parties cannot agree among themselves regarding the number of hours worked or the regular rate of pay. For example, suppose an employer paid an employee a specified amount per hour and also furnished room and board to him. If the employee worked in excess of 40 hours per week, then under the rulings of the Wage and Hour Division the value of the room and board must be taken into consideration in determining the regular rate of pay on the basis of which overtime is to be computed. The employer may claim that the board and lodging is worth $30.00 a month while the employee, with the hope of increasing the amount of his overtime, may assert that the board and lodging is worth $60.00 a month. Here, as we see it, there is no question of trifling with or attempting to evade the mandate of Congress; there is a simple issue as to the monetary value of the board and lodging. We cannot believe that in such a case the Supreme Court intended to say that the parties could not finally agree that the value of the board and lodging was $45.00 a month or $35.00 a month, and base their computation of the regular rate of pay on such an agreement.

Again, let us take a case involving the portal-to-portal principle. Suppose the employee contends that the time required to travel from the main entrance to the face of his shift is twenty minutes at the beginning of the shift and also at the end of the shift, while the employer insists that the allowable time is ten minutes. *We cannot believe that the Supreme Court intended to say that the parties could not, in connection with pending litigation, arrive at a settlement based on a time allowance of fifteen minutes at the beginning and at the end of the shift.*

In other words, as the Court itself recognized, we submit that there is a plain and obvious distinction between the settlement of an issue as to coverage and the settlement of an issue as to hours worked or regular rate of pay. A dispute as to coverage involves a denial of the rights which Congress has provided; on the other hand, a dispute as to hours worked or regular rate of pay recognizes the existence of the rights created by statute and involves only the question as to the measure of those rights. *We submit, most respectfully, that this Court should not extend the doctrine of the Schulte case beyond the scope which the Supreme Court has laid down.* As we noted in our analysis of the Supreme Court's opinion, that court expressly stated that in arriving at its conclusion it was considering only the validity of settlements of disputes over coverage and was not considering "the possibility of compromises in other situations which may arise, such as a dispute over the number of hours worked or the regular rate of employment." Furthermore, in the footnote to which we have referred above, the Court plainly indicated that it was

considering only a case where a settlement had been worked out directly between the parties and was not considering the case in which an action was commenced, the issues were joined, and then a stipulation for judgment was submitted "to judicial scrutiny".

Thus, there are two basic, fundamental differences between the situation presented to the Supreme Court in the Schulte case and the situation presented to this Court in the present case. In the first place, this case involves actual litigation in which the issues have been pleaded and a stipulation for entry of judgment has been submitted to the Court for its consideration and approval after both parties presented evidence with respect to the merits of the settlement. Secondly, it is apparent that in final analysis the issue here is one of fact with respect to the number of hours worked, as distinguished from a dispute over coverage. So that there may be no question on the latter point, we turn for a moment to the consideration of a portion of the transcript in the present case.

V

THIS CASE DOES NOT INVOLVE A DISPUTE OVER COVERAGE

At the conclusion of the hearing on April 22nd, this Court made inquiry of counsel for defendant as to whether there was any question but that the defendant was engaged in the production of goods for commerce and therefore fell within the terms of the Fair Labor

Standards Act. In response to the Court's inquiry, Mr. Rockwood, of counsel for defendant, stated that some of the guards were working in barracks, dormitory and cafeteria areas, outside the shipyard proper, and that there was a dispute between the parties as to whether the guards in such positions were engaged in commerce or the production of goods for commerce. However, Mr. Rockwood went on to state that the individual guards, with few exceptions, were on various posts throughout their period of employment; indicating, in other words, that the guards rotated from one post to another. In this connection Mr. Rockwood stated "a guard one day might be working inside the fence, along the ways, we will say. Another day, that same guard might be working over in Mock's Bottom, near the parking lot, outside the fence, and another day he might be working on some other post." In response to a further question by the Court, *Mr. Rockwood stated that there was no question about the main proposition that the Company was in a position placing it within the provisions of the Fair Labor Standards Act.*

At the proceedings on May 13, 1946, this Court referred to the foregoing portion of the transcript and raised the question as to whether these statements of counsel for the defendant injected an issue with respect to coverage into this case.

We submit that upon analysis the statements do not present an issue with respect to coverage. It was conceded that the Company itself was engaged in commerce or the production of goods for commerce so that

its operations fell within the coverage of the Fair Labor Standards Act. The particular situation to which Mr. Rockwood referred was the question as to whether the fact that a guard, in the course of rotation from post to post, worked one day inside the shipyard fence (concededly engaged in the production of goods for commerce) and another day worked outside the fence (possibly not engaged in the production of goods for commerce) destroyed the guard's rights under the Act during the time spent outside the shipyard proper.

Since the proceedings of May 13, 1946, *an investigation has been made in an effort to determine whether any of the plaintiffs in the present action spent a full work week in beyond the fence activities, and no such case has been discovered. It must be recognized that if during a particular week a plaintiff performed any work in commerce or in the production of goods for commerce, then he is entitled to the benefits of the Act for that week, irrespective of whether a part of his work was intrastate in character. Consequently, defendant has determined that there are no facts with respect to the plaintiffs here involved warranting an assertion that during any work week any of said plaintiffs were not entitled to the benefits of the Act, and defendant therefore waives any such point which may have been raised by* the remarks of its counsel which were referred to by the Court.

The ultimate fact is that the real dispute in this case relates to the amount of time which the plaintiffs were required to spend in reporting for roll call and inspec-

tion. That is a factual question on which the parties have agreed by their stipulation.

If the Court deems it necessary that the record be clarified, defendant respectfully suggests that the parties be permitted to amend Paragraph 4 of their stipulation by confining their statement of the controversy to what is basically the issue of the case, namely, the hours worked by the plaintiffs. We are confident that plaintiffs' counsel would readily join with us in such an amendment if it is necessary to clear the record.

VI

CONCLUSION—THE COURT HAS THE POWER TO ENTER JUDGMENT PURSUANT TO THE STIPULATION OF THE PARTIES IN THE PRESENT CASE

Inasmuch as the Supreme Court's decision in the *Schulte* case is limited to non-judicial settlements of disputes over coverage, we earnestly submit that that decision has no application to the present case. Here, the real issue between the parties is an issue of fact as to the hours worked. The parties have, after lengthy negotiations, agreed to the entry of a judgment based on an agreement with respect to the hours worked. *The proposed settlement is one which the Court has characterized as "fair and regular" and which would be approved without question were it not for the problem as to whether the Supreme Court's decision in the Schulte*

case has removed this Court's power to approve the settlement. In view of the limitations which the Supreme Court has imposed upon the principles announced in the Schulte decision, we respectfully submit that this Court still has full power to enter judgment pursuant to the stiplation of the parties.

Should the Court, notwithstanding the briefs of the parties, still have doubt with respect to its power in the premises, we respectfully request an opportunity to argue the matter at a time convenient to the Court.

Respectfully submitted,

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APPENDIX B

CASES CITED BY APPELLEE RE STIPULATIONS FOR ENTRY OF JUDGMENTS

(1) *West v. Bk. of Commerce & Trusts,* 167 F(2d) 664,6, held only that where an attorney for a city does not have authority to consent to entry of judgment such a judgment is not binding upon the city, particularly where the attorney attempted to stipulate with respect to the validity of a statute or ordinance. But in the usual case, as in this case, no question of authority to consent is involved and no attempt to stipulate upon the validity of a statute.

(2) *Hot Springs Coal Co. v. Miller,* 107 F (2d) 677, affirmed the entry of a judgment on stipulation by the trial court. Although it was not held that the courts have a duty to enter such judgments, neither was it held that the courts may disregard stipulations for entry of judgments and the effect of the decision was to approve the entry of such a judgment.

(3) *Rogan v. Essex County News Co. Inc.,* 65 F. Supp. 82, was a lower court decision refusing to enter judgment based on stipulation in 1946 upon the ground that under *Brooklyn Savings Bank v. O'Neill,* 324 U.S. 697, rights under the Fair Labor Standards Act could not be waived except upon clear showing that statutory requirements were satisfied, and that there was a "complete absence of such a showing." The case was decided in 1946 before the Portal-to-Portal Act was adopted

to expressly permit such settlements and in this case there was a clear showing that former requirements were also satisfied. (See opening brief pp. 41-6.)

(4) *United States v. R.C.A.*, 46 F. Supp. 654, involved a consent decree for an injunction, in which equitable powers and duties of the courts involve different considerations than in an action at law. Although it was held that such consent decrees could be set aside upon a showing of lack of consent, fraud, or lack of jurisdiction, the effect of the decision was to leave undisturbed the consent decree involved.

(5) *McLeod v. Hyman* (Pa.) 116 At. 535, did not involve the entry of a judgment based on stipulation, but only the setting aside of some procedural stipulation in an attachment case, the exact effect of which is not clear.

(6) *Everett v. Cutler Mills* (R.I.) 160 At. 924, did not involve the original entry of a judgment based on stipulation, but only the question whether such a judgment would be set aside upon proof that it was entered under mistake of fact.

(7) *Kidd v. McMillan* (Ala.), 21 Ala. 325, also did not involve the original entry of judgment based on stipulation, but only the question whether a judgment, once entered, would be set aside after the end of the term on stipulation of the parties.

(8) *Merrill v. Batchelder* (Cal.) 56 Pac. 618, involved primarily a question whether an attorney was author-

ized to stipulate for the entry of judgment and the judgment so entered was not disturbed. See the later case of *Capitol Nt. Bk. v. Smith,* (Cal.) 144 P (2d) 665, 669, 673-4.

(9) *Automobile Ins. Co. v. United States,* 10 F.R.D. 489, was a decision by Judge Fee himself holding that under the Federal Tort Claims Act a stipulation for entry of Judgment will not be approved without a complete pre-trial conference, trial, findings of fact and conclusions of law "the same as any other civil action." Since that act specifically imposes on the District Courts the affirmative duty to approve compromises and settlements of tort claims against the government—a requirement which does not exist in absence of statute and which was not included in the Fair Labor Standards Act—the case is clearly distinguishable from this case.

APPENDIX C

Analysis of Provisions and Intent of Section 3 of Portal-to-Portal Act

1. The reference of Section 3 of the Portal-to-Portal Act to the Fair Labor Standards Act, *as amended,* was to that act as *previously* amended rather than to any new limitations imposed by section 2.

(a) The Fair Labor Standards Act had previously been amended several times. See, for example, 29 U .S. C. A. Sec. 206, 207, 209 and 211. The usual reference to an Act that has been previously amended is to that act "as amended". If section 3 intended to exclude claims barred under section 2 it would have made specific reference to sec. 2 and not make general reference only to the F.L.S.A. "as amended."

(b) Reference in other sections of the Portal-to-Portal Act, *including section 2 itself,* to the Fair Labor Standards Act "as amended" make clear that the same reference in section 3 was to *previous* amendments, and not to any claimed amendment as a result of section 2. (See 29 U.S.C.A. sec. 251 (a); 252 (a), (c), (d) and (e); 254 (a) and (d), 255, 256, 257, 258, 259, 260, 261 and 262). If references in other sections to the F.L.S.A. "as amended" meant as changed by section 2, the results would be absurd. (See for example, 29 U.S.C.A. sec. 251 (a) referring to the F.L.S.A. "as amended" as having been in the past "judicially interpreted.")

(c) While some other sections of the Portal-to-Portal Act were intended and phrased as amendments to the Fair Labor Standards Act (see sec. 5 of original Portal-to-Portal Act, H. B. 2157, 80th Congress, 1st session, and 29 U.S.C.A., sec. 216 (b) and (c), as thus amended), the remaining sections, including section 2, were not enacted as amendments to the Fair Labor Standards Act, but as a separate Act entitled the Portal-to-Portal Act of 1947. That Congress made such a distinction between provisions of that Act shows further that the reference in section 3 to the F.L.S.A. "as amended" was not intended to refer any limitations imposed by sec. 2 of the same Act.

(d) Congressional Reports discussing section 3 do not refer to claims under the F.L.S.A., *as amended*, but to *any* action under that Act (see Conference Report No. 326 and House Report No. 71, 80th Cong., 1st Session).

2. It was not only intended that section 3 authorize and ratify settlements of *any* cause of action or actions under the Fair Labor Standards Act, but *it was expressly intended to authorize and ratify settlements of the very type of "portal-to-portal" claims outlawed by section* 2 in the absence of such settlements.

(a) Although we do not have available copies of the original proposed statutes (S. B. 70 and original draft of H. B. 2157, 80th Cong., 1st session), house and senate reports indicate clearly that the provisions of the senate version of those bills relating to compromises and settle-

ments were expressly limited to the same types of portal-to-portal claims otherwise destroyed by other provisions of the same acts (see S. R. 37, p. 47, and S. R. 48, p. 46, referring to "all *such* claims." See also Cong. Rec. 80th Cong., 1st session, p. 2376 with text of sec. 4 (d) and (e) as passed by senate). This is further indicated by the Senate amendment that settlements of such claims must provide that the proceeds be distributed among the real parties in interest to such claims (a limitation later abandoned).

(b) Senator Donnell, in presenting the Senate Report on that early version of the Act, stated, after reference to portal-to-portal claims, that

> "We feel, however, that in the case of *these surprise liabilities, liabilities which industries did not expect, which neither management nor employees expected, it is entirely proper and is conducive to disposing of such cases with expedition and dispatch that there should be the power to make settlements, compromises, and releases or satisfaction of claims.*"
>
> (93 Cong. Rec., [3-18-47] p. 2180.)

Senator Donnell also stated that the Act was not intended to interfere with any rights under contract (Id., p. 2127) which might involve constitutional questions, as might result if rights under settlements were impaired.

(c) House Report 71, apparently referring to the corresponding section of the original H. R. 2157, states at

p. 8 that "section 2 (b) provides that *any* claim, cause of action or action may be settled . . ." Apparently this view was adopted in the final Act, since section 3 (a) of the final Act refers without limitation for compromises of "*any* cause of action" under the F.L.S.A. (as amended), to "*any* action" to enforce such a cause of action and in section 3 (d) to "*any* compromise" theretofore made. (See 29 U.S.C.A. sec. 253 (a) and (d). Since, as demonstrated above, the phrase "as amended" cannot be regarded as a limitation, the effect of this language is to include not only "portal-to-portal" claims, as contemplated under earlier versions of the Act, but *any* claims theretofore accrued under the F.L.S.A.

(d) The fact that section 3 is limited to claims *theretofore accrued* under the F.L.S.A. and *not* made applicable to claims *later arising* further supports the view that section 3 was intended largely to enable then existing portal-to-portal claims to be disposed of by settlement, in accordance with the statement of Sen. Donnell.

(e) Discussion of the final act on the floor of Congress makes further plain that Congress did not abandon its original intent (as stated by Sen. Donnell) that section 3 authorize and ratify settlement of portal-to-portal claims, but if anything expanded the application of section 3. Thus Sen. Gwynne, in explaining the conference report (No. 363) stated that "There is also a provision in this bill which allows the settlement and compromise of *all claims* under these three acts in existence at the time the law becomes effective" (93 Cong.

Rec., supra, p. 4388). Rep. Walter, in explaining provisions of the bill in the house relating to compromises made no limitation as to the types of claims involved, so long as there was a "bona fide dispute" upon either an issue of law or fact (Id. 4389). Objections by Sen. McGrath on the day of final passage in the Senate that these provisions might be abused by government contractors in settlements of "portal-to-portal" claims were unheeded (Id. 4372). (See also "The Portal-to-Portal Act of 1947" [B.N.A.], supra.)

APPENDIX D

Points and Authorities Re Filing of Supplemental Complaint

Agreements of compromise and settlement are enforceable in the courts. *Brown v. Spotford,* 95 U.S. 474, 483 and Apts.' Op. Br. p. 13-17. The supplemental complaint alleges that "the parties hereto agreed upon a compromise and settlement of this cause", together with facts qualifying under section 3 of the Portal-to-Portal Act (R. 157-8). It is therefore submitted that a claim is stated upon which relief can be granted.

It should not be necessary to repeat arguments set forth above to disprove appellee's contentions (pp. 37-8) that the limitations of section 2 of the Act have no bearing on such compromises; that the compromise in this case satisfies the requirements of section 3. Even though section 3 may not create a new cause of action based on compromise, it recognizes that there may be a valid compromise and settlement of a "portal-to-portal" claim and such a compromise and settlement, if valid, is enforceable. *McClosky v. Eckart,* supra, cited by appellee (p. 38) is not to the contrary, but at p. 259 lends support to this view.

Appellee next contends that a stipulation for judgment is not a contract, but the authorities cited (p. 39) hold only that a *judgment* on stipulation is not a contract. It is submitted, on the contrary, that a stipulation for judgment is a contract as between the parties and

the fact that it may require approval of the court by entry of judgment does not establish the contrary since all stipulations are contracts as between the parties, even though they may require court approval. (See Apt.' Op. Br. pp. 20-23 and see *In re Morris Metal Products Corp.,* 4 F (2d) 1003, cert. den. 267 U.S. 601, defining the term "stipulation" as an *agreement* between counsel respecting business before the court." But regardless of whether a stipulation for entry of judgment may or may not be a contract and that any breach was by the court, not by appellee, as contended by appellee (p. 39) the allegations of the supplemental complaint in this case are not limited to the stipulation for judgment and allege, generally, an unqualified agreement of compromise and settlement and the failure of appellee to make the payments agreed upon (R. 157-8) which may be supported by any evidence, such as that appellee offered evidence admitting that the sum of $17,382.08 was "agreed to be owing." (R. 98-9).

As for contentions by appellee (p. 40) that requirements of diversity of *citizenship* are not satisfied by allegations of the supplemental complaint that all plaintiffs are *"residents and inhabitants"* of states other than Nevada, it may be that this allegation is technically defective, but the defect is one that could be corrected by amendment (*Harlee v. City of Gulfport,* supra, at 43) or by new action, either of which might be claimed to be foreclosed by the dismissal of this case with prejudice. As for contentions by appellee (p. 40) that the jurisdictional amount of $3000 cannot be satisfied by aggregation of claims, it is true that ordinarily claims

cannot be aggregated for this purpose. But while such a rule might apply to aggregation of separate claims under the F.L.S.A., as in cases cited by appellee, there is a well recognized exception to that rule where, as here, the claims do not rest upon the act, but all rest upon a single agreement of compromise and settlement and therefore present a single controversy (i.e., whether the agreement of compromise and settlement is binding). See 1 *Cyc. of Fed. Proc.* (2d Ed.) sec. 165; 1 *Barron & Holtzoff,* supra, p. 49; 72 A.L.R. (Anno.) at p. 206; *Local Union No.* 497 *v. Joplin & P. Ry. Co.,* 287 F. 473 at 475; *Phillips Pet. Co. v. Taylor,* 115 F (2d) 726, 728. And, again, the dismissal with prejudice by Judge Fee might be claimed to foreclose not only any supplemental complaint, but also any later action, whether by aggregation of claims or otherwise.

Appellee next (p. 41-3) contends that the supplemental complaint alleges a contract based on statutory rights, which Congress can retroactively modify or destroy and that since the original complaint fails to state a cause of action in view of the Portal to Portal Act, no supplemental complaint can be allowed, particularly one based on a contract since destroyed by Congress. But, as demonstrated above, section 3 of that Act expressly authorized and ratified compromise settlements under the F.L.S.A., even of "portal-to-portal" claims. While it is true that the cases cited by appellee uphold retroactive destruction of contracts based on statutory rights, none of those cases involved statutory provisions expressly authorizing and ratifying compromise settlements, as in this case.

As for the contention that the Portal-to-Portal Act destroyed the original cause of action, thus making improper any supplemental pleading, the usual rule and the rule stated by the *Bowles* and *Berssenbrugge* cases cited by appellee (p. 42) is that if the court has jurisdiction *"at the time of filing the original bill,"* it should allow a supplemental complaint alleging new facts occurring since the original complaint and which will modify the amount or nature of relief sought. See also 1 *Barron & Holtzoff,* supra, p. 941. It is a familiar rule that once a federal court acquires jurisdiction it may decide all questions arising until complete relief is afforded even though ultimately holding that there was no federal question. *Siler v. L. & N. R. Co.,* 213 U.S. 175, 191; *McGowan v. Parish,* 237 U.S. 285, 296; *P.R.L. & P. Co. v. Portland* (D. Or.) 210 Fed. 667. This same principle applies as to supplemental proceedings. 54 Am. Jur. p. 689. Therefore, since in this case the court had jurisdiction when the complaint was filed and since then a compromise settlement was arrived at which was expressly approved and ratified by sec. 3 of the Portal-to-Portal Act, the court could properly grant relief under a supplemental complaint to enforce such a settlement even though *after* filing the complaint the cause of action may have been retroactively destroyed by sec. 2 of the Act. In the *Bonner* case (cited by appellee, p. 42) the situation was quite different, since the supplemental complaint alleged facts subsequent even to the Portal Act, rather than a previous settlement as approved by section 3 of that Act. But, again, even though Judge Fee may have had discretion to refuse filing of a

supplemental complaint, his decision should not have been on grounds that may be urged to bar later filing of a separate action to enforce the settlement agreement.